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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 527

CARPENTERS AND JOINERS UNION OF AMERICA, LOCAL No. 213, ET AL.,

Petitioners,

vs.

RITTER'S CAFE, ET AL.

PETITION FOR REHEARING AND BRIEF IN SUPPORT THEREOF.

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HENRY KAISER,
Counsel for Petitioners.

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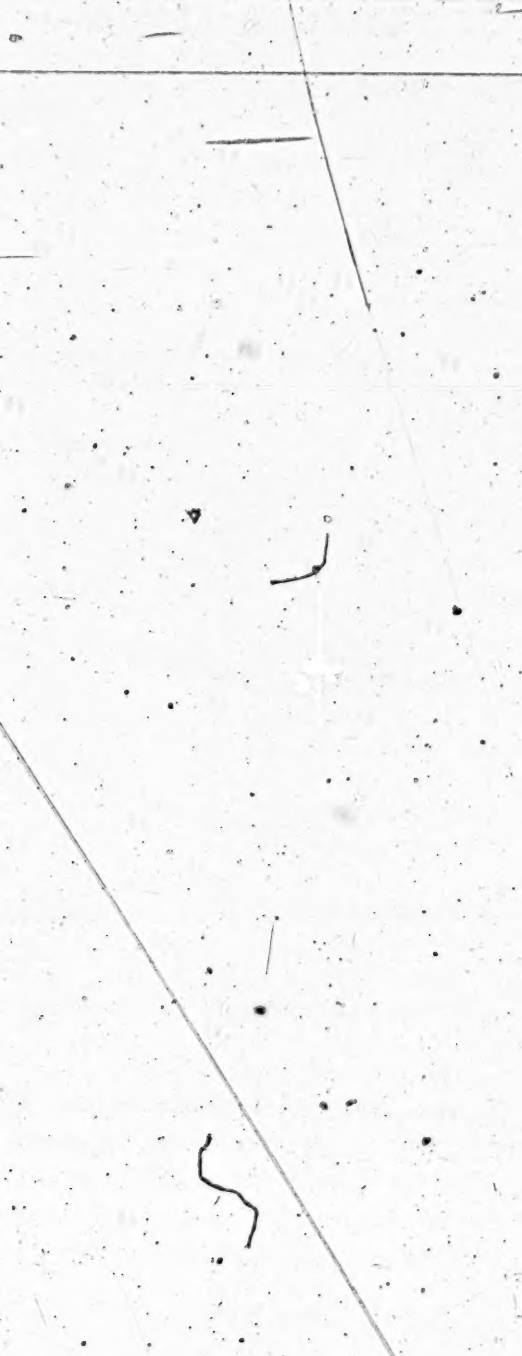

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CARPENTERS AND JOINERS UNION OF AMERICA, LOCAL No. 213, ET AL.,

Petitioners,

vs.

RITTER'S CAFE, ET AL.

PETITION FOR REHEARING.

To the Honorable the Justices of the Supreme Court of the United States:

Petitioners respectfully represent to this Honorable Court as follows:

1. Petitioners are the petitioners-appellants in the above entitled matter.

2. On March 30, 1942, this Honorable Court issued a decision herein, sustaining an injunction which enjoined petitioners from peacefully picketing the respondent at his cafe and enjoined them from carrying banners in front of the cafe, which banners contained inscriptions truthfully

informing the public that "The Owner of This Cafe Has Awarded A Contract to Erect A Building to W. H. Plaster Who is Unfair to The Carpenters Union 213 and Painters Union 130, Affiliated With The American Federation of Labor".

3. In reaching its conclusion, this Honorable Court reasoned from a mistaken statement of petitioners' claims. In addition, crucial reliance was placed upon decisions of State courts, most of which were subsequently overruled. This Honorable Court ruled that the decree of the Court of Civil Appeals of Texas did not infringe the freedom of speech guaranteed by the Fourteenth Amendment to the Constitution of the United States.

4. The decision constitutes an extreme departure from principles heretofore announced by this Honorable Court, and has thereby precipitated great confusion among organized working people as to the nature and extent of the constitutional protection of their means of communicating their grievances to the public.

5. This Honorable Court premised its decision on considerations and principles that were neither explicit nor implicit in the decision of the court below. Accordingly, petitioners did not, either in their brief or oral argument, discuss the considerations or principles relied upon by this Honorable Court. Therefore, petitioners earnestly request an opportunity to present full argument on these matters.

6. The granting of such an opportunity is especially appropriate in view of the inestimable importance of the said decision to organized labor, and in view of the close division among the Honorable Justices of the Supreme Court, and in view of the absence of Mr. Justice Roberts during the course of oral argument.

Wherefore, petitioners pray this Honorable Court that it grant the rehearing requested herein.

Respectfully submitted,

JOSEPH A. PADWAY,
SEWALL MYER,
HENRY KAISER,
Counsel for Petitioners.

I hereby certify that this petition is being presented in good faith and not for purposes of delay.

_____,

JOSEPH A. PADWAY.

BRIEF IN SUPPORT OF PETITION.

Introduction.

We appreciate that, customarily, a brief in support of a petition for rehearing is and should be short and concise. However, for reasons which we shall soon assert, we respectfully ask the Court's indulgence for filing a rather full brief in support of the instant petition.

The decision of this Honorable Court raises constitutional questions and evolves principles of transcendent importance. These were not, and we respectfully suggest could not reasonably be, anticipated from the record before this Honorable Court.

The attorney for petitioners, out of respect for the valuable time of this Honorable Court, relied upon a very short brief submitted in support of the application for a writ. He did so because of his studied conviction that the decision of the lower court was completely at variance with the doctrines pronounced by this Honorable Court. We realize that mistaken judgment of this kind is neither ground for a rehearing, nor does it justify a relaxation of the rules regulating briefs in support of petitions for rehearing. But we earnestly urge that this was not an instance of mistaken judgment. Indeed, our entire petition is based on the claim that this Honorable Court has in effect reversed its own controlling decisions.

We believe that the effect of the instant decision will be drastically to curtail basic civil liberties for organized labor and others, all in derogation of the Constitution of the United States and of the decisions of this Honorable Court.

Obviously, under these circumstances, more extensive argument than is usual in briefs of this kind is appropriate.

The Court Misconceived Petitioners' Contentions.

The Court's statement of petitioners' claim reflects the essential error of its approach. We are told that

> "the petitioners now claim that there is to be found in the Due Process Clause of the Fourteenth Amendment a constitutional command that peaceful picketing must be *wholly immune from regulation* by the community in order to protect the general interest, that the states *must be powerless to confine* the use of this industrial weapon *within reasonable bounds:*" (Emphasis supplied.)

Such a claim would obviously be wholly without merit. It could not possibly be sustained unless the Due Process Clause were to be entirely ignored and unless every decision thereon were to be repudiated and overruled.

But, it is respectfully submitted, petitioners did not and do not make that claim or any other claim remotely resembling it. What petitioners did claim is that the *particular regulation in this case* by the Court of Civil Appeals of Texas was repugnant to the Fourteenth Amendment.

Petitioners' actual claims are set forth in the brief submitted in support of the petition for writ of certiorari. We quote the claims therein made, because they show quite clearly the sharp difference between the claims actually made and those mistakenly assigned to petitioners:

> "1. Making the constitutional right of petitioners to have one of their members peaceably picket, *to depend upon the existence of a labor dispute between Ritter, the employer, and his employees,* is a ban upon free communication, inconsistent with the guaranty of free speech under the Fourteenth Amendment of the United States Constitution" (Brief, pp. 14-15).
>
> "2. The constitutional right of petitioners' members to carry such placard upon a public sidewalk in front

of Ritter's Cafe, *in the manner and under the circumstances as was done in this case*, cannot be prevented by an injunction issued by a state court *upon the grounds and because of the fact that the business of Ritter's Cafe would be injured thereby*" (Brief, pp. 15-16).

"3. The Anti-Trust Statutes of Texas cannot and do not exclude workingmen from peacefully exercising the constitutional right of free communication of the facts of a labor dispute *in the manner as was being done in this case*" (Brief, p. 16).

"4. A state court cannot by injunction exclude workingmen from peacefully exercising the constitutional right of free communication of the facts of a labor dispute, *in the manner as was being done in this case*" (Brief, p. 16).

"5. The dissemination of information concerning the facts of the labor dispute *involved in this case*, come within the area of free discussion that is guaranteed by the United States Constitution." (Brief, p. 17.) (Emphasis supplied.)

We repeat, then, petitioners by no means asserted that picketing—or any other phase of free speech—is an absolute right beyond the regulatory powers of the state.

The Unusual and Erroneous Approach of the Court.

Having thus erroneously posed petitioners' claim, the court had little difficulty in repudiating it. In so doing, however, the court forsook its usual approach to cases involving civil liberties. It unduly emphasized the sovereign powers of the State of Texas and, at the same time, unduly deemphasized the Bill of Rights.

In the instant case the court neither expressly "adverted to the generous scope that must be given to the guarantee of free speech"—Mr. Justice Frankfurter in *Milk Wagon Drivers Union* v. *Meadowmoor*, 312 U. S. 287,—nor did it give it such scope. Heretofore, this Honorable Court, as it

has "frequently indicated," "guarded" the right of free speech—even when it was exercised in the form of a peaceful picket—"with a jealous eye." Mr. Justice Frankfurter in *American Federation of Labor* v. *Swing*, 312 U. S. 321, 325.

It has become axiomatic that, whatever the extent of the restraints imposed upon state action by the Due Process Clause, those restraints are greater where civil liberties are involved. *Schneider* v. *State*, 308 U. S. 147, 161; *Herndon* v. *Lowry*, 301 U. S. 242, 258; *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152 n. Therein lies the explanation for the "seeming inconsistency"[1] on the part of those great judicial champions of civil liberties, Mr. Justice Holmes, Mr. Justice Brandeis and Mr. Justice Cardozo. These great justices, particularly Mr. Justice Holmes and Mr. Justice Brandeis, insisted upon the right of states to exercise their sovereign powers and formulate their own social and economic policies free from restriction by the Fourteenth Amendment. *Lochner* v *New York*, 198 U. S. 45; *Truax* v. *Corrigan*, 257 U. S. 312; *Adams* v. *Tanner*, 244 U. S. 590; *Coppage* v. *Kansas*, 236 U. S. 1.

In cases involving a state restriction of civil liberties, however, they were among the most prominent of those who asserted the Due Process Clause as a bar to such state action. See *Gitlow* v. *New York*, 268 U. S. 652; *Gilbert* v. *Minnesota*, 254 U. S. 325. See also *Abrams* v. *United States*, 250 U. S. 616.

As has been cogently stated, any inconsistency attributable to these Justices was but a "seeming" or surface inconsistency.

> "Friendly critics have suggested that Cardozo viewed encroachments upon civil liberties with less

[1] Frankfurter, Cardozo and Public Law, 52 Harvard Law Review 440, 461 n.

deference to the legislative judgment than that which he accorded to economic measures. The same seeming inconsistency has been suggested against Holmes, and the answer made in Holmes' case applies to Cardozo as well:

"'The Justice deferred so abundantly to legislative judgment on economic policy because he was profoundly aware of the extent to which social arrangements are conditioned by time and circumstances, and of how fragile, in scientific proof, is the ultimate validity of a particular economic adjustment. He knew that there was no authoritative fund of social wisdom to be drawn upon for answers to the perplexities which vast new material resources had brought. And so he was hesitant to oppose his own opinion to the economic views of the legislature. But history had also taught him that, since social development is a process of trial and error, the fullest possible opportunity for the free play of the human mind was an indispensable prerequisite. Since the history of civilization is in considerable measure the displacement of error which once held sway as official truth by beliefs which in turn have yielded to other truths, the liberty of man to search for truth was of a different order than some economic dogma defined as a sacred right because the temporal nature of its origin had been forgotten. And without freedom of expression, liberty of thought is a mockery. Nor can truth be pursued in an atmosphere hostile to the endeavor or under dangers which only heroes hazard.

"'Naturally, therefore, Mr. Justice Holmes attributed very different legal significance to those liberties of the individual which history has attested as the indispensable conditions of a free society from that which he attached to liberties which derived merely from shifting economic arrangements. . . . Because these civil liberties were explicitly safeguarded in the Constitution or conceived to be basic to any notion of the liberty guaranteed by the Fourteenth Amendment, Mr. Justice Holmes was far more ready

to find legislative invasion in this field than in the area of debatable economic reform.' Frankfurter, Mr. Justice Holmes and the Supreme Court (1938) 50-51."[2]

As already observed, the approach of these Justices in cases involving civil liberties, which has been fully adopted by this Honorable Court in labor and other free speech cases,[3] has, for reasons that do not seem justified, been abandoned in the instant case. Instead, the Court, probably as a result of the mistaken statement of petitioners' claim, asserts and emphasizes as its major premise the right of Texas to promote "the health, safety, morals and general welfare of its people."[4]

The majority opinion leaves the impression that the State of Texas, after careful investigation, had concluded that peaceful picketing beyond a very precise point was highly detrimental to the general welfare of the state and must, therefore, be prohibited.

That, of course, is not so. The state decision brought before this Honorable Court did not come "encased in the armor wrought by prior legislative deliberation." Mr. Justice Black in *Bridges* v. *California*, 314 U. S. — . And even if it had, there could be no basis for a legislative find-

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[2] Frankfurter, Cardozo and Public Law, 52 Harvard Law Review 440, 461 n.

[3] *Thornhill* v. *Alabama*, 310 U. S. 88; *Carlson* v. *California*, 310 U. S. 106; *American Federation of Labor* v. *Swing*, *supra*; *Milk Wagon Drivers Union* v. *Meadowmoor*, *supra*; *Bridges* v. *California*, 314 U. S. —; *Cantwell* v. *Connecticut*, 310 U. S. 296; *Schneider* v. *State*, *supra*; *C. I. O.* v. *Hague*, 307 U. S. 196.

[4] Mr. Chief Justice Hughes in *Near* v. *Minnesota*, 283 U. S. 697, 707. It must not, of course, be forgotten that the *Near* case is one of the great milestone decisions safeguarding and preserving civil liberties against state infringement. There, the Court voided a legislative attempt by the State of Minnesota to suppress a newspaper by injunction. This, in spite of the fact that the newspaper had been publishing scandalous and libelous matters.

ing that picketing in the circumstances of the instant case was a greater evil or greater threat to the general welfare of Texas than picketing in the circumstances of the *Thornhill* case (*Thornhill* v. *Alabama*, 310 U. S. 88) was to the State of Alabama, or picketing in the circumstances of the *Carlson* case (*Carlson* v. *California*, 310 U. S. 106) was to the State of California, or picketing in the circumstances of the *Journeymen Tailors'* case (*Journeymen Tailors Union, Local No. 195, et al.*, v. *Miller's, Inc.*, 61 S. Ct. 732) was to the State of New Jersey, or picketing in the circumstances of the *Wohl* case (*Bakery & Pastry Drivers & Helpers Local 802* v. *Wohl*, decided March 30, 1942) was to the State of New York, or picketing in the circumstances of the *Swing* (*supra*) and *Meadowmoor* (*supra*) cases was to the State of Illinois.

Continuing the assumption that the Legislature of Texas had fixed the limits of free speech by workingmen, it would still be necessary, in order to justify such a drastic restriction, to support the "legislative judgment in the light of the facts made known or generally assumed"; to predicate that judgment "upon some rational basis." Mr. Justice Stone in *United States* v. *Carolene Products Co.*, *supra*, 152.

For otherwise—and history has proved this to be especially true of labor legislation—constitutional cases of the highest importance would be decided "on abstract issues, on tenuous theories of economic and political philosophy"[5] rather than on supportable facts.

Thus, Mr. Justice Roberts, speaking for the Court in *Schneider* v. *State*, *supra*, 161, stated:

> "This court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. The phrase is not an empty one and

[5] Frankfurter, "Hours of Labor and Realism in Constitutional Law," 29 Harvard Law Review 353, 365.

was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men. It stresses, as do many opinions of this court, the importance of preventing the restriction of enjoyment of these liberties.

"In every case, therefore, where legislative abridgment of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts *to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights.*" (Emphasis supplied.)

Again, speaking for the Court in *Herndon* v. *Lowry*, *supra*, 258, Mr. Justice Roberts said:

"The power of a state to abridge freedom of speech and of assembly is the exception rather than the rule and the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government. The judgment of the legislature is not unfettered. The limitation upon individual liberty must have appropriate relation to the safety of the state. Legislation which goes beyond this need violates the principle of the Constitution."

Plainly, there are no facts whatever in the instant record that do or could justify a conclusion either by our assumed Legislature or by the few judges who constitute the Court of Civil Appeals that picketing under the circumstances of this case constituted so great an evil as to require, for the general welfare of the State of Texas, the abridgment of

"fundamental personal rights and liberties." No such facts were or are available to Texas Tribunals, even if they had deemed them necessary to a determination of the constitutional question presented, which they manifestly and erroneously did not. The judgment of the court below certainly "does not evidence any * * * care in balancing * * *" the interest of the community and that of the individual in freedom of discussion. *Thornhill* v. *Alabama, supra,* 105.

The fact is that the Texas Court premised its decision on the common law precedents of that state that antedated —and have been set aside by—the *Thornhill* case. Common law precedents, it may be added, which were the product of the "environment, the social and economic ideas of judges, which * * * became translated into law." Mr. Justice Brandeis, in *Duplex Printing Press Co.* v. *Deering,* 254 U. S. 443, 485.

It would be sufficient to rely upon the written opinions of the Texas Court in order to demonstrate the truth of the foregoing. However, any doubt that might arise from merely reading those decisions is completely dissipated by a decision rendered by the same court a few weeks after that rendered in the instant case. *Borden* v. *Local,* 152 S.W. 822. That case shows conclusively that the decision in the instant case can hardly be said, as stated by Mr. Justice Frankfurter, to have been the result of a declaration by

> "Texas * * * that its general welfare would not be served if, in a controversy between a contractor and building workers' unions, the unions were permitted to bring to bear the full weight of familiar weapons of industrial combat against a restaurant business, which, as a business, has no nexus with the building dispute. * * *";

nor does it represent an undertaking by

> "Texas * * * to localize industrial conflict by prohibiting the exertion of concerted pressure directed at the business, wholly outside the economic context of the real dispute * * *."

In the *Borden* case the facts are identical with those involved in the *Wohl* case, *supra,* and in the *Meadowmoor* case, *supra,* differing from the latter in that the picketing was entirely peaceful. The Teamsters' Union picketed the retailers who were customers of a dairy company with whom the union was engaged in a labor dispute. The case came before the same court and the opinion was written by the same judge, Chief Justice Monteith. The court discussed the same precedents and the same statutes that it did in the *Ritter* case, in almost the identical language. Then, premising its decision in the *Borden* case squarely on the rule it announced in the *Ritter* case, it held that the picketing was enjoinable.

This, we submit, establishes beyond refute that the State of Texas did not, through its Court of Civil Appeals in the *Ritter* case, draw any careful lines or seek reasonably to regulate the public communication of true facts by organized working people. To put it bluntly, that court was simply determined to perpetuate the prejudices of its judges in complete and total "disregard of the plain meaning"[6] of the decisions of this Honorable Court.

This brings us to what we conceive to be one of the basic errors in the decision of this Honorable Court. As shown, there is no factual foundation upon which to conclude that the State of Texas in the instant case did "impose reasonable regulation." This Honorable Court apparently assumed that the regulation was reasonable because "in forbidding such conscription of neutrals in the circumstances

[6] 90 University of Pennsylvania Law Review, 201, 206.

The Court Applied a Novel and Erroneous Test in the Instant Case.

Having concluded in the *Thornhill* case that picketing was within the constitutional protection of free speech, this Honorable Court logically and consistently applied the same test that it had in other free speech cases,[10] the "clear and present danger" test to permissive state regulation (310 U. S. 88, 105).

All the subsequent free speech labor cases reaffirmed the clear and present danger test.[11]

In the instant case, however, the Court abandoned that test. We are not told why, nor can we conceive of any valid reasons for differentiating between picketing by working people, and the use of this or other forms of utterance by other persons.

In the *Thornhill* case this Honorable Court, for the first time, recognized that picketing was an aspect of free speech and, therefore, entitled to the same protection as any other form of utterance.

In the *Carlson* case this Honorable Court stated:

> "The carrying of signs and banners, no less than the raising of a flag, is a natural and appropriate means of conveying information on matters of public concern. * * * publicizing the facts of a labor dispute in a peaceful way through appropriate means, whether by pamphlet, by word of mouth, or by banner, must now be regarded as within that liberty of communication which is secured to every person by the Fourteenth Amendment against abridgment by a state." 310 U. S. 106, 112.

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[10] *Schenck* v. *United States*, 249 U. S. 47, 39 S. Ct. 247; *Abrams* v. *United States*, *supra*; *Whitney* v. *California*, 274 U. S. 357, 47 S. Ct. 641 (concurring opinion of Brandeis); *Herndon* v. *Lowry*, *supra*; *Cantwell* v. *Connecticut*, 310 U. S. 296; *Bridges* v. *State of California*, *supra*.

[11] *Carlson* v. *California*, *supra*; *Milk Wagon Drivers' Union, et al.*, v. *Meadowmoor Dairies, Inc.*, *supra*; *American Federation of Labor* v. *Swing*, *supra*.

In the *Meadowmoor* case this Honorable Court held that:

> "Peaceful picketing is the workingman's means of communication." 312 U. S. 287, 293.

In the *Swing* case this Honorable Court held that the right to picket is "the right of free discussion." 312 U. S. 321, 325.

Finally, in the instant case it is recognized that peaceful picketing is "an exercise of free speech."

Thus, it has in recent years been abundantly established that there is no constitutional difference between picketing and other means of communication, such as, for example, the radio, the pamphlet, the newspaper, the formal address, and others.

It is true, of course, that historically this particular means of communication has, in the main, been used exclusively by working people. But surely, this incident does not, and cannot, mean that there is any constitutional difference between picketing and the modes of communication usually employed by other groups in society.

It is not required of persons speaking on a political subject to express themselves only in connection with a political controversy. It is not required of persons speaking on religious matters to discuss only facts arising out of a religious controversy. And even assuming these to be prerequisites to protection by the federal Constitution, it is certainly not required that those persons be parties to such controversy. Even more certainly, it is not necessary that they address themselves only to persons who are parties to the controversy. Finally, and perhaps most pertinently, nowhere in these other instances of free speech, with exceptions not here relevant, can a state dictate the nature or personnel of the audience or the precise place where expression may be exercised or the means of expression that must be used.

Why, then, do we find such a host of limitations imposed upon the workingman's means of communication,—limitations that are so flagrantly alien to our concepts of free speech? There is, we think, but one explanation, an explanation that is grounded in history but has no proper bearing on the constitutional issue involved in the instant case.

Prior to the *Thornhill* case, and for many years, because of the prevailing prejudices on the part of many judges, picketing was conceived of as being inherently wicked and hateful. Thus, less than forty years ago, a federal judge held:

> "There is and can be no such thing as peaceful picketing, any more than there can be chaste vulgarity or peaceful mobbing or lawful lynching." *Atchison, etc., Co.* v. *Gee*, 139 Fed. 582.

This conception was by no means unique. Indeed, it probably represented the prevailing view.[12]

Only some twenty years ago, Chief Justice Taft, writing for a majority of this Honorable Court, said that the word "picket" indicated "a militant purpose, inconsistent with peaceable persuasion," that the word "picketing" was a "sinister name," that "peaceful picketing was a contradiction in terms." *American Foundries* v. *Tri-City Council*, 257 U. S. 184, 205, 207; *Truax* v. *Corrigan, supra*, 340.

Small wonder, therefore, that in a judicial atmosphere of that kind neither labor spokemen nor their legal repre-

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[12] *Pierce* v. *Stablemen's Union*, 156 Ca. 70, 103 Pac. 324; *Franklin Union* v. *People*, 220 Ill. 355, 77 N. E. 176; *Vegelahn* v. *Guntner*, 167 Mass. 92, 44 N. E. 1077; *In re Langell*, 178 Mich. 305, 144 N. W. 841; *Glass Co.* v. *Glass Blowers*, 77 N. J. Eq. 219, 79 Atl. 262; *O'Neil* v. *Behanna*, 182 Pa. 236, 37 Atl. 843; *St. Germain* v. *Bakery Workers*, 97 Wash. 282, 166 Pac. 665; *Otis Steel Co.* v. *Molders*, 110 Fed. 698; *Kolley* v. *Robinson*, 187 Fed. 415; *Vonnegut Machinery Co.* v. *Toledo Machine and Tool Co.*, 263 Fed. 192.

sentatives thought of establishing the right to picket on a constitutional basis. Their more immediate objective was to liberalize state and federal statutes and judicial precedents so as to enlarge their elementary rights. It took years to penetrate through the accumulated mass of prejudice before picketing was recognized for what it quite simply and obviously is—a means of stating facts. This recognition was facilitated by the enactment of federal legislation such as the Clayton Act of 1914, the Norris-LaGuardia Act of 1932, the National Labor Relations Act of 1935, and state legislation patterned upon them.

It was in the decision by this Honorable Court, in a case dealing with the constitutionality of the Wisconsin Anti-Injunction Act, a prototype of the federal Norris-LaGuardia Act, that appeared for the first time a statement that adumbrated the *Thornhill* decision:

> "Members of a union might, without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution." *Senn* v. *Tile Layers' Protective Union*, 301 U. S. 468, 478.

On the strength of that statement, the precise constitutional issue before the Court in the instant case was, for the first time, presented to this Honorable Court in the *Thornhill* case. Thus, it is clear that in discussing or deciding any case, wherein the claim is made that picketing is protected by the Fourteenth Amendment, "The starting point is Thornhill's Case." Mr. Justice Frankfurter, *Meadowmoor, supra* 293.

In the instant case, however, Mr. Justice Frankfurter saw fit to refer to and to rely upon judicial pronouncements in cases that antedated the *Thornhill* case, cases wherein the constitutional question had never been thought of or raised. It is the erroneous reliance upon these irrelevant cases, we

of the case before us, Texas represents the prevailing, and probably the unanimous, policy of the states."

Later in this brief we shall elaborate on the precise meaning of the phrase "the conscription of neutrals," and its irrelevancy to the instant case. For the nonce, we dwell upon the fact that, even assuming the propriety of relying upon state cases that antedated the *Thornhill* decision and did not involve constitutional issues—and we shall show the impropriety of so doing—nevertheless, the statement made by Mr. Justice Frankfurter is without foundation. The decision by the Texas Court of Appeals in the *Ritter* case does not represent the prevailing—and certainly not the unanimous—policy of the states.

In support of the aforequoted statement, the Court cited Teller, Labor Disputes and Collective Bargaining, (1940), Section 123. Mr. Teller cites decisions from nine states, California, Colorado, Illinois, Indiana, New Jersey, Ohio, Pennsylvania, Washington and West Virginia. A careful check of the decisions cited—some of them being the decisions of lower courts in those states—shows that many of the actual cases cited have been reversed by the state courts on appeal or rehearing, and that of the nine states only two might possibly rule the same way today.

The California cases cited are all decisions of lower courts. As Mr. Teller points out in Volume I of his 1941 Supplement, p. 40, all these cases were overruled by the Supreme Court of California in *Fortenbury* v. *Superior Court*, (decided Oct. 14, 1940), 106 P. (2) 411.

The Colorado decision cited by Mr. Teller, *Perry Truck Lines* v. *Teamsters*, was also a decision of a lower court and was subsequently reversed by the Supreme Court of the state (decided March 18, 1940) 101 P. (2) 436.

For Illinois, Mr. Teller cited the *Meadowmoor* case, which was subsequently reviewed by this Honorable Court and which was, in so far as it was not premised on violence, overruled. Also cited is the case of *Ellingsen* v. *Milk Wagon Drivers' Union*, which the Supreme Court of Illinois, upon consideration of the decisions of this Honorable Court in the *Meadowmoor* and *Swing* cases, reversed (June 13, 1941) 4 C. C. H. Labor Cases, 60,544. The final case cited by Mr. Teller, *Maywood Farms Co.* v. *Milk Wagon Drivers' Union*, has also been recently reversed. 313 Ill. App. 24 (Jan. 19, 1942).

The Indiana case of *Munsey Building Co.* v. *Umbarger*, 17 N. E. (2d) 828, decided in 1938, cited by Mr. Teller, is unquestionably overruled by the recent decision of the Supreme Court of that state in *Harley Davis* v. *Scott Yates*, 4 C. C. H. Labor Cases, 60,367.

The several New Jersey cases cited by Mr. Teller have been overruled by the following recent decisions of the Court of Appeals and Errors, the highest court of the State of New Jersey. *Heine's, Inc.* v. *Truck Drivers*, 129 N. J. Eq. 308, 19 A. (2d) 204 (April, 1941); *Laura Lee Dress Co., Inc.* v. *International Ladies' Garment Workers' Union*, 127 N. J. Eq. 564, 19 A. (2d) 659; *Feller* v. *Local 44*, 129 N. J. Eq. 421, 19 A. (2d) 784 (May 1, 1941); *Newark Milk & Cream Co.* v. *Milk Drivers & Dairy Employees' Local*, 19 A. (2d) 232, (March 27, 1941).

The case of *Alliance Auto Service* v. *Cohen*, cited by Mr. Teller, was decided by a lower court in Pennsylvania and has been reversed by the Supreme Court of that state. 19 A. (2d) 152 (Penn. 1941).

The case cited for the State of Washington has doubtlessly been overruled by the implications of the recent decision of the Supreme Court of that state in *O'Neill* v. *Building Service Employees' International Union*, 115 P. (2d) 662 (July 24, 1941).

As for Ohio, the Supreme Court of that state is apparently reluctant to yield to the decisions of this Honorable Court. This Honorable Court has refused to grant certiorari in a case coming from that state on the ground that the federal question had not been properly presented. *Springfield, Ohio, Local No. 352 of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, et al.*, v. *William Settos*, certiorari denied October 20, 1941, 86 L. Ed. 89, 62 S. Ct. 123. It is clear, though, that the decision of the Ohio court is expressly premised on the doctrine of the Illinois Court in the *Swing* case, a doctrine which has since been repudiated both by this Honorable Court and the Supreme Court of Illinois.

The West Virginia case cited by Mr. Teller, *Parker Paint Co.* v. *Local Union*, 87 W. Va. 631, was decided over twenty years ago. We are unaware of any recent decision on this point by the Supreme Court of West Virginia, but here again, there is no question but that, should it follow the decisions of this Honorable Court in the *Swing, Meadowmoor, Journeymen Tailors* and *Wohl* cases, it will overrule that old decision.

Moreover, Mr. Justice Frankfurter's adoption of the "prevailing" state law is even more amazing in view of the fact that, under the Norris-LaGuardia Act, picketing of the type involved in the present case would not be enjoinable. *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U. S. 552. Congress, in passing the Norris-LaGuardia Act, has declared it to be the policy of the United States to permit peaceful picketing in situations similar to that involved in Ritter's restaurant. This Act has, in turn, been passed by a number of the states. The intent of Congress and state legislatures in passing anti-injunction legislation along the lines of the Norris-LaGuardia Act certainly should be re-

guarded, if it is deemed relevant to inquire into "policies" concerning the area of allowable picketing.[7]

Thus, what appears to be the sole ground of this Honorable Court for concluding that the decision of the Texas Court in the instant case constituted a reasonable regulation of free utterance is completely without foundation.[8] That alone is, we submit, sufficient reason for a reconsideration and reversal of this Honorable Court's decision.

Let us inquire somewhat into the Court's statement as to what policy Texas sought to pursue in the instant case. It is said that Texas forbade the "conscription of neutrals".

We are not altogether certain who the "neutrals" in the instant case were. They might be the general public that passed the pickets, or the inside restaurant workers who quit their employment, or possibly Ritter himself.

Even more abstruse is the intended meaning of the word "conscription". Webster's New International Dictionary defines the verb "conscript" to mean "to enroll by compulsion for military service; to draft". The noun "conscript" is defined as "one compulsorily enrolled to serve as a soldier or sailor".

Even granting a wide poetic license to the phrase, we respectfully assert that there is nothing in this record to support a conclusion that either the inside restaurant workers or the general public were forced, or compelled, to aid the unions in their industrial dispute. If the phrase is intended to apply to Ritter, then the short answer is that Ritter was not a "neutral". As will subsequently be shown

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[7] One trag e effect of the determination in the *Ritter* case is that all state and even federal courts now construing state and federal anti-injunction acts broadly, consonant with the legislative purpose, may very well feel free to narrow their constructions to their individual views of what might constitute the area of allowable picketing.

[8] In addition to the cases above discussed, we respectfully direct the Court's attention to the recent decisions cited by Mr. Justice Reed in his dissent; (F. N. 6).

at greater length, Ritter was a primary disputant. Surely, it will not be denied that it was in Ritter's power to have the building which he owned constructed by a union contractor. This he failed to do, although, as expressly found by the court below, he was called upon by the business agents of the unions and was requested to require the use of union labor (R. 27),[9] a fact which is not alluded to in the majority opinion.

We have shown that the Court in the instant case gave excessive and unfounded weight to the powers of the State of Texas. The necessary corollary has been greatly and unprecedently to minimize the guarantees of the Bill of Rights. Perhaps nowhere in the majority opinion is this more patently demonstrated than in the closing, truncated quotation from the *Thornhill* case.

The Court pointed to the necessity of being

> "mindful that 'the rights of employers and employees to conduct their economic affairs and to compete with others for a share in the products of industry are subject to modification or qualification in the interests of the society in which they exist. This is but an instance of the power of the State to set the limits of permissible contest open to industrial combatants.'"

Surprisingly enough, however, Mr. Justice Frankfurter saw no need whatever of being mindful of the large and all-important qualification set forth in the next immediately following sentences of the *Thornhill* opinion (p. 104):

> "It does not follow that the State in dealing with the evils arising from industrial disputes may impair the effective exercise of the right to discuss freely industrial relations which are matters of public concern.

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[9] The opinion of this Honorable Court overlooks this most pertinent finding of fact. It shows quite conclusively that the unions had a direct and immediate grievance against Ritter.

> A contrary conclusion could be used to support abridgment of freedom of speech and of the press concerning almost every matter of importance to society."

The Court's approach in this case is directly at variance with the decision in the *Swing* case. There, it was held

> "That a state has ample power to regulate the local problems thrown up by modern industry and to preserve the peace is axiomatic. But not even these essential powers are unfettered by the requirements of the Bill of Rights. The scope of the Fourteenth Amendment is not confined by the notion of a particular state regarding the wise limits of an injunction in an industrial dispute, whether those limits be defined by statute or by the judicial organ of the state. A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him." Mr. Justice Frankfurter, p. 325.

Each and every word of the foregoing quotation applies directly and forcefully to the instant case. The decision in the instant case and that of the *Swing* case cannot possibly be reconciled, unless we accept the absurd conclusion that the Fourteenth Amendment has a different meaning when applied to the State of Texas than when applied to the State of Illinois. For surely, Illinois, under its police powers, had as much justification for "drawing the circle" as Texas, in the instant case, had to "draw the line." The Due Process Clause does not, quite obviously, accord greater sanction to Texas' "notion of * * * wise limits" than it does to that of Illinois. Upon the authority of the *Swing* case, therefore, the instant decision should be reversed.

respectfully submit, accounts for the peculiar and unwarranted limitations imposed upon picketing. Suffice it to say, without enumerating all the limitations expressed in, and inferable from, the majority opinion, that no other form of communication usually employed by persons and groups other than workingmen is subjected to a test remotely similar to the one imposed by the instant case—namely, that free speech as exercised by workingmen is constitutionally protected only "in circumstances where there exists 'on interdependence of economic interest of all engaged in the same industry' ".

We are told by the majority opinion that

> " • • • the circumstance that a labor dispute is the occasion of exercising freedom of expression does not give that freedom any greater constitutional sanction or render it completely inviolable."

We respectfully suggest that, under the holding and reasoning in the instant case, the Court has, in effect, ruled that the circumstance that a labor dispute is the occasion of exercising freedom of expression gives that freedom much lesser constitutional sanction and renders it almost completely violable.

Manifestly, there is no justification in constitutional law or elsewhere to deprive organized labor of its one traditional and characteristic mode of communication on the ground that "other traditional modes of communication" remain open.[13] The constitutional right established in the *Thornhill* case was the right "*effectively* to inform the public of the facts of a labor dispute." (Emphasis supplied.)

The picket established in front of the restaurant was the most effective communication available to petitioners. It was on this untenable ground—the effectiveness of the picket—that the lower court justified the injunction, and

[13] *Schneider* v. *State*, *supra*.

this, apparently, is the unsupportable basis for the majority opinion in the instant case.

Assuming the Validity of the Test, It Was Improperly Applied to the Facts of This Case.

It is readily demonstrable that regardless of the constitutional propriety of the test employed in the instant case, it was improperly applied to the facts of the case.

The Court has necessarily held that Ritter was not one of those engaged in the building industry. If he was, then clearly the Court would have been "confronted * * * with a limitation upon speech in circumstances where there exists an 'interdependence of economic interest of all engaged in the same industry,' " and, under the ruling of the Court, that limitation would be unconstitutional.

As we analyze it, then, the ruling of the Court, even assuming the validity of the test imposed, is necessarily dependent upon the conclusion that Ritter was not engaged in the building industry. That this conclusion is palpably erroneous is, we submit, self-evident. It is clear that Ritter is one of the "all engaged" in the building industry included in the instant case. He was the owner of the building at 2810 Broadway, Houston, Texas, and the person who awarded the contract for its construction.

The Court unrealistically and artificially separates a particular industry from the persons connected with it. It speaks of the absence of a "nexus" between the building industry and the restaurant industry but fails completely to see the obvious nexus between Ritter and both those industries. In so doing, the majority opinion uses language that fails to describe the true situation.

Thus, it is said that the unions sought to bring pressure "against a restaurant business, which, as a business, has no nexus with the building dispute but which *happens* to

be owned by a person who contracts with the builder." (Emphasis supplied.)

It would have been much more accurate, and much more consistent both with the record in this case and with common experience, to have said that the unions sought to announce their real and just grievance *against a person who, by his voluntary act, deprived their members of an opportunity to work on his building*, and this person, Ritter, *happens* to own a restaurant. The union was announcing what it conceived to be a just and bona-fide grievance against Ritter and it made that announcement at a place where it would prove most effective—his place of business which happened to be a restaurant.

The effort of the Court to distinguish the instant case from the *Wohl* case, is to leave state courts in hopeless confusion as to what this Court now holds. It is said that "the dispute there (the *Wohl* case) related to the conditions under which bakery products were sold and delivered to retailers. The business of the retailers was therefore directly involved in the dispute." Identically, the dispute in the instant case relates to conditions under which the construction of a building was sold to Ritter. The business of Ritter was, therefore, directly involved in the dispute. Plainly, the two cases cannot be distinguished on the ground that a building—unlike a bakery product—is not a mobile chattel and is incapable of being delivered. Ritter was no less a customer of Plaster than the retailer was of the peddler in the *Wohl* case.

Indeed, Ritter's relationship to the dispute and to the construction of the building at 2810 Broadway was much more obvious and direct than that of the retailers in the *Wohl* case to the business of delivering bakery products. As already observed, Ritter was directly responsible for the fact that non-union craftsmen were employed at that building. He created that condition by his own voluntary

act. He was in a position directly to have averted and altered that condition. The retailers in the *Wohl* case can hardly be said to have caused the union grievance there, or were hardly in a position directly to remedy that union grievance.

By no stretch of the imagination can it be said that any retailer in the *Wohl* case was more of a "real adversary" to the union in that case than Ritter was to the unions in the instant case. To suggest, as the majority opinion does, that Ritter was not a "real adversary" to the unions in the instant case is, we submit, to flout both the record and common experience.

The area of the building industry in which building craftsmen may successfully prosecute their grievances is, because of the essential and inherent nature of that industry, not fixed or static. It is necessarily flexible and depends upon and is coextensive with the activities of the owner of any given building operation.

It matters not to a union of building craftsmen—nor should it matter—that the owner of a building about to be constructed or is in process of construction or is fully erected, is a builder, a meat packer, a restauranteur, or is engaged in any other business or profession; nor does it matter that the particular building is a residential hotel, a meat warehouse, or a restaurant. What does matter is that the particular owner is in a position to have the building put up by union members under union conditions, or to have it put up by non-union members under non-union conditions.

Should such owner determine to employ non-union members, the unions have the constitutional right to communicate that fact to the public.

"Communication by such employees of the facts of a dispute, *deemed by them to be relevant to their interest, can no more be barred because of concern for*

the economic interest against which they are seeking to enlist public opinion than could the utterance protected in Thornhill's Case." Mr. Justice Frankfurter, *Swing, supra*, 326.

It is well known that building trades unions frequently approach the owner, rather than each possible contractor and subcontractor, in order to negotiate agreements. This is done because of obvious and practical considerations. Since the owner has it within his power to determine the working conditions of all the crafts engaged on a construction job, a single negotiation with him would dispose of the entire job. To negotiate with each contractor requires not only considerable time but also may, and frequently does, result in a situation wherein several of the crafts on a single job are unionized and others not, and such a situation is likely to result in stoppages and other conflicts.

It is well known that the building trades unions in every large city of the country maintain business representatives who call upon owners of prospective building operations to use union labor. It is well known, too, that craftsmen engaged in the building trades have but limited means of effectively announcing their grievances to the public because buildings are often erected for occupancy by tenants of the owner. Once the tenants occupy the building there is little use in picketing the building.

Likewise most buildings are erected for persons who are not engaged in a continuing building industry. For instance, there are large chain stores in the country who are continuously erecting buildings. Building craftsmen have found that the only effective means of inducing these large chain store owners to employ union craftsmen is for such craftsmen and their organizations to appeal to their fellow members and sympathizers not to do business with chain stores who will not erect their structures with union workers.

It is well known that to picket the contractor is in most

instances a useless task. Many contractors do not live in the city where the building operation is taking place. Likewise the local and small building contractor may have only one job in operation at one time, and there may be lapses of time between the finishing of one building and the commencement of another. If unionized building craftsmen are to obtain employment instead of non-union craftsmen, their most effective and usual means is to induce the owner of the building operation to employ union contractors who engage union help.

Does it not shock common sense and reason to hold that an owner who is engaged in several enterprizes such as operating a restaurant and a public garage, and who wishes to engage in a third enterprise, namely the operation of a motion picture business, and erects a third building for that purpose, cannot be picketed at the restaurant or at the garage by union building craftsmen who seek the work which the owner decides to give to non-union craftsmen? We are at a loss to know what the Court would hold in the event the so-called "real adversary", namely the contractor, were not within the sphere of dispute, in that the owner of the building operation directly employed non-union workers. In such a case could union workers picket him at his restaurant or at his garage? If they are allowed to picket him at the new building operation only, because the restaurant has no nexus with the building operation or the dispute concerning it, then what may we say at the building operation in the exercise of freedom of speech? May we add to the statement that here is a person, (giving his name), who is erecting this building with non union labor, a plea that those who sympathize with the cause of organized labor shall not patronize his restaurant? If we may not add the plea to the other portion of the announcement, may the announcement and all the picketing be prohibited because the people passing the building operation know that he is the man who

owns the restaurant and therefore cease patronizing him? It is hard to understand how the effect on the restaurant business of picketing the building operation can be severed so that the restaurant business will not be affected.

The truth is that the pronouncement affects Ritter who is the owner of the building operation, and since there is a nexus between Ritter and the dispute there is an absolute nexus between the restaurant and the building operation. Any business operation of Ritter's in the city of Houston at a time when he was engaged in the building operation, whether by direct hiring of non union labor or through a non union contractor has a nexus with said building operation and with the dispute respecting it. The unsupportable contention and the basic error of the Court is premised on its holding that Ritter's business, other than his business of erecting a building, has no nexus with the dispute. His various business enterprises cannot be separated from Ritter, and Ritter and his building operation has a nexus with the dispute and the industry in which it arose.

We are led to believe that the Court recognizes the truth of this assertion because it intimates that so far as Plaster was concerned, if he were engaged in other businesses and other industries he could have been picketed. The Court said:

> "• • • Texas has not attempted to protect other business enterprises of the building contractor, Plaster, who is the petitioners' real adversary."

It is most probable, State courts will construe the Ritter decision as prohibiting picketing of any business of Plaster outside the building industry.

The attempted insulation of Ritter from this controversy because he has employed a contractor to erect his building is wholly fallacious. It does not conform to the accepted method of doing business between owners of building opera-

tions and the workers employed or who seek employment in the building operation. Both state and federal governments, as owners of building operations, acknowledge that fact every day in the contracts entered into by them with contractors. In numerous contracts the Government specifies that the contractor must employ workmen who will be paid a specific wage and whose hours of work will be limited. Number of states and numerous municipalities provide that union labor shall be employed; others provide for prevailing wage scales which are to be determined on the basis of the union scale in the community. The Bacon Davis Act and the Walsh-Healey Act are premised upon that philosophy. In fact, some of these Acts permit the Secretary of Labor to place on a so-called blacklist contractors who have violated the terms and conditions provided by the Government, and when these contractors are so blacklisted they cannot receive a contract for the period of time they are on the blacklist in any enterprise they are engaged in, no matter how many different enterprises they are engaged in. Thus the contractor who is engaged in different industries in different cities is incapable of obtaining any government contract while he appears on the blacklist for any violation. This is a realistic recognition of "economic interdependence."

Under the instant decision, any builder in the State of Texas, who is engaged in another enterprise not directly connected with the building business,—and it is safe to prophesy that other states will soon follow in line—can apparently nullify constitutional rights by the simple device of having his buildings put up by a non-union contractor. By so doing, he normally saves himself money, since the wage costs of a union operation are generally higher than those of a non-union operation. At the same time, he is immunized against loss because usually the only effective

redress left to the union workers is to picket him at his place of business wherever that may be.

It is unrealistic to suggest the availability of a picket in front of the non-union construction job, since the non-union contractor doubtlessly has taken exceeding good care to employ workers who are apathetic or antipathetic to unionization. Moreover, a building in process of construction is not, of course, a business which is being patronized by the general public.

We respectfully urge that constitutional rights—particularly rights of free speech—do not hang on such exceedingly tenuous strands. The decision in the instant case will have the effect of depriving many thousands of organized building craftsmen of basic rights that are available to others.

Conclusion.

That the holding in the instant case is limited to the precise circumstances therein presented is necessary and usual, but a decision in a "concrete case" should not be dealt with "in the shallow belief that a case is a discreet phenomenon having neither genealogy nor offspring".[14]

We have already adverted to the "genealogy" of the instant decision. It derives from a culture pattern of hostility to organized labor which the judiciary of the land, in an effort to dignify it, converted into the "common law".

This judicial process prompted severe criticism by dissenting judges, informed laymen, scholarly investigators and responsive legislators. Resulting remedial legislation was often vitiated by adamant courts.[15]

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[14] Frankfurter, Cardozo and The Public Law, 52 Harvard Law Review, 462, 463.

[15] Frankel, Judicial Interpretation of Labor Laws (1939) 6 University of Chicago Law Review 577; Cooper, The Conviction of Peaceful Picketing (1936) 35 Mich. Law Review 73.

The Constitution being, of course, superior to the legislation of any state or Congress, organized labor thought that when the *Thornhill* decision was announced, it had at long last been granted a Magna Carta that would not prove wholly or partially illusory.

The decision in the instant case, however, can be fairly said to have made the freedom enjoyed under the *Thornhill* doctrine short-lived and transitory. State courts have evidenced a ready "zeal to pervert"[16] the free speech labor decisions of this Honorable Court, especially that of the *Meadowmoor* decision.[17] These same courts will seize upon both the holding and the language employed in the majority opinion in the instant case completely to emasculate the *Thornhill* doctrine. It is not mere rhetoric so to predict; the decision in the instant case will prove an effective opening wedge for the return of "Government by injunction".

We have refrained from making reference to or discussing the dissenting opinions of Mr. Justice Black and Mr. Justice Reed. The clear, logical and sound pronouncements set forth in those opinions are not met by the majority determination. One observation must be made, namely, the dissenting opinions are consistent with the recent opinions of this Court in the *Thornhill*, *Carlson* and *Swing* cases. The majority opinion does all but actually reverse them.

Respectfully submitted,

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[16] Frankfurter, *Meadowmoor*, supra, 298.

[17] See, Peaceful Picketing and The Constitutional Guarantee of Free Speech Since the Swing Case, 90 University of Pennsylvania Law Review, 201; 41 Columbia Law Review 727.